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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Charlene Renee Vadovich,

No. CV-24-01234-PHX-JJT

10 Plaintiff,

ORDER

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

15 At issue is the denial of Plaintiff Charlene Renee Vadovich’s Application for
16 Disability Insurance Benefits by the Social Security Administration (“SSA”) under the
17 Social Security Act (“the Act”). After the SSA filed the Administrative Record (Docs. 8–
18 9, R.) and Plaintiff filed her Opening Brief (Doc. 13, Pl. Br.), Defendant Commissioner of
19 SSA filed a Response and Motion to Remand (Doc. 20, Def. Mot.), to which Plaintiff
20 replied (Doc. 21, Reply).

21 **I. BACKGROUND**

22 Plaintiff filed an application for Disability Insurance Benefits on March 30, 2021,
23 for a period of disability beginning on February 1, 2021. (R. at 38.) Her claim was denied
24 initially on September 29, 2021, and upon reconsideration on December 14, 2022. (R. at
25 38.) On May 9, 2023, Plaintiff appeared by telephone before the ALJ for a hearing
26 regarding her claim. (R. at 38, 156–88.) On June 2, 2023, the ALJ denied Plaintiff’s claim.
27 (R. at 38–51.) On March 28, 2024, the Appeals Council denied Plaintiff’s Request for
28 Review of the ALJ’s decision. (R. at 1–3.)

1 In the Decision, the ALJ found Plaintiff had the severe impairments of osteoarthritis
2 and obesity. (R. at 40.) Plaintiff argues in her Opening Brief that the ALJ erred by
3 concluding her mental impairments are not severe based on an “insufficient rejection of the
4 agency’s nonexamining reviewer’s opinion from Joshua Rubin, Psy.D.” (Pl. Br. at 1.)

5 Dr. Rubin never examined or treated Plaintiff, but he reviewed Plaintiff’s treatment
6 record and completed an evaluation on July 26, 2022, in which he noted that an assessment
7 dated October 21, 2021 reported “depression and anxiety” and Plaintiff’s consumption of
8 “7-8 beers daily”; a report on November 17, 2021 stated “alcohol abuse with [Plaintiff]
9 planning to cut down to one beer per day”; and a report on March 24, 2022 stated Plaintiff
10 was “still drinking 4 16oz beers daily” and “has a [history] of alcoholic cirrhosis.” (R. at
11 216.)

12 Dr. Rubin noted Plaintiff had monthly psychiatry appointments from November
13 2021 to April 2022, “suggesting symptoms not well-controlled,” and Plaintiff reported
14 suffering from “partner abuse issues as well as continued alcohol abuse problems” but she
15 “declined substance abuse [treatment].” (R. at 217.) Dr. Rubin concluded that “signs and
16 symptoms of depression are present” but signs of PTSD are lacking. (R. at 217.) He also
17 stated Plaintiff “has been drinking on an ongoing basis, declined specific [treatment] for
18 this, and there is no discrete period of sobriety,” so “her best level of functioning must be
19 considered.” (R. at 217.) He observed that the “case is most notable for alcohol abuse.” (R.
20 at 217.) Dr. Rubin ultimately opined that Plaintiff was moderately limited in the ability to
21 maintain concentration for extended periods; to perform activities within a schedule,
22 maintain regular attendance, and be punctual within customary tolerances; and to complete
23 a normal workday and workweek without interruptions from psychologically based
24 symptoms and to perform at a consistent pace without an unreasonable number and length
25 of rest periods.” (R. at 222.) He also opined that Plaintiff “is able to carry out one to two
26 step instructions, follow simple work-like procedures, and make simple work-related
27 decisions.” (R. at 222.)

28 . . .

1 In his Decision, the ALJ discounted Dr. Rubin’s assessment of Plaintiff’s functional
 2 limitations as inconsistent with the evidence of record that noted Plaintiff’s “intact
 3 cognition,” “fair to normal memory and concentration, the ability to follow a three-step
 4 command, full orientation and normal behavior and mood.” (R. at 48.) Among others, the
 5 ALJ cited the September 22, 2021 assessment of examining psychologist Dustin Howard,
 6 Psy.D., who opined that Plaintiff suffered from “unspecified alcohol-related disorder” and
 7 “unspecified cannabis-related disorder.” (R. at 48, 1105–06.) Although not explicitly noted
 8 by the ALJ, Dr. Howard’s examination report stated that “[n]o overt or clinically significant
 9 signs of depression, anxiety, or any other emergent or chronic mental health condition were
 10 observed” in Plaintiff and “additional documentation does not provide evidence of her
 11 current or previous mental health treatment.” (R. at 1106.) Dr. Howard thus declined to
 12 diagnose Plaintiff with a depressive order and noted instead that Plaintiff “is actively using
 13 both alcohol and cannabis which is likely for self-medication purposes.” (R. at 1106.)
 14 Ultimately, Dr. Howard concluded that Plaintiff’s “cognitive abilities remain intact as
 15 evidenced by her score of 25/30 on the Mini-Mental Status Exam.” (R. at 1106.)

16 Plaintiff now argues the ALJ erred by not finding Plaintiff had severe impairments
 17 of bipolar disorder, PTSD, and depression based on Dr. Rubin’s review of Plaintiff’s
 18 medical records. (Pl. Br. at 18–23.) In response, the Commissioner asks the Court to
 19 remand this matter for the ALJ to fill the gap between the opinions of Dr. Rubin and
 20 Dr. Howard, which constitutes an outstanding issue for which further proceedings are
 21 necessary.¹ (Mot. at 5–7.) In reply, Plaintiff states the ALJ already resolved any conflict
 22 but did so in favor of Dr. Howard’s opinion without sufficient reason supported by
 23 evidence in the record. (Reply at 6.) Plaintiff underscores the fact that Dr. Rubin conducted
 24 his records review in July 2022, after Plaintiff had mental health treatment, and Dr. Howard

25
 26 ¹ The Commissioner also argues that, in terms of Plaintiff’s physical limitations, the
 27 ALJ properly weighed the examination findings of Dr. Robert Gordon as well as the other
 28 medical source evidence, but if the Court disagrees, remand for further proceedings, not
 payment of benefits, is the appropriate remedy. (Mot. at 7–10.) Because the Court agrees
 with the Commissioner with regard to his principal argument—the ALJ inadequately
 addressed Plaintiff’s alleged mental and related limitations—the Court need not reach the
 parties’ arguments with regard to Plaintiff’s alleged physical limitations.

1 examined Plaintiff in September 2021, before that treatment. (Reply at 6.) Under the credit-
2 as-true rule, Plaintiff thus asks the Court to remand not for further consideration but for a
3 calculation and payment of disability benefits. (Reply at 8, 11.)

4 **II. LEGAL STANDARD**

5 Generally, the ordinary remand rule—providing that a case should be remanded for
6 further proceedings upon a finding of material error by the ALJ—applies in Social Security
7 cases. The credit-as-true standard, if applied, results in a remand of Plaintiff’s case for a
8 calculation and payment of benefits. *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir.
9 2014). It applies if each part of a three-part standard is satisfied. *Id.* First, the record must
10 have been fully developed and further administrative proceedings would serve no useful
11 purpose. *Id.* Next, the ALJ must have failed to provide sufficient reasons for rejecting
12 claimant’s testimony or medical opinions. *Id.* Finally, if the improperly discredited
13 evidence were credited as true, then the ALJ would be required to find the claimant
14 disabled. *Id.* Remand for a calculation and payment of benefits is only appropriate when
15 the Court is left with no uncertainty that the claimant is disabled under the Act. *Treichler*
16 *v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099–1102 (9th Cir. 2014).

17 **III. ANALYSIS**

18 Although both parties request remand of this case to the SSA, upon review of the
19 medical evidence and Plaintiff’s testimony, the Court agrees with the Commissioner that
20 uncertainty remains as to whether Plaintiff is disabled under the Act, precluding application
21 of the credit-as-true rule here. Plaintiff argues that the ALJ erred in weighing Dr. Rubin’s
22 evaluation of Plaintiff and in not finding Plaintiff’s claimed mental impairments of bipolar
23 disorder, PTSD, and depression to be severe (Pl. Br. at 18–23), and the Commissioner
24 contends that the ALJ’s evaluation and comparison of the opinions of Dr. Howard and
25 Dr. Rubin was inadequate, requiring further evaluation (Mot. at 5–7).

26 To begin with, neither Dr. Howard nor Dr. Rubin concluded Plaintiff suffered from
27 bipolar disorder or, correspondingly, was limited in her functional capacity as a result.
28 Plaintiff alleges a disability onset date of February 1, 2021. In his examination of Plaintiff

1 on September 22, 2021, Dr. Howard’s notes do not indicate that Plaintiff even mentioned
2 bipolar disorder, and Dr. Howard noted that the medical records “[do] not provide evidence
3 of her current or previous mental health treatment.” (R. at 1106.) In his review of the
4 medical records on July 26, 2022—after Plaintiff had undergone some mental health
5 treatment—Dr. Rubin mentions that bipolar disorder was indicated in a treatment note, but
6 he does not find signs and symptoms of bipolar disorder present. (R. at 217.) The Court
7 also cannot find any mention of bipolar disorder in the citations attached to the single time
8 the ALJ mentioned bipolar disorder in his Decision, “Exs. 8F/14, 19; 9F/44.” (R. at 42; R.
9 at 1122, 1127, 1177.) For her part, Plaintiff presents a two-page argument about the effects
10 of bipolar disorder without providing a single citation to the record indicating she actually
11 has bipolar disorder. (Pl. Br. at 19–21; 2–8.) In sum, the Court finds no merit to Plaintiff’s
12 argument that the ALJ erred by failing to consider the effects of bipolar disorder; no
13 disability finding can be based on crediting as true a fact that is not supported by the record.

14 Likewise, neither Dr. Howard nor Dr. Rubin noted limitations resulting from PTSD.
15 Dr. Howard again makes no mention of PTSD (R. at 1102–06), and while Dr. Rubin cites
16 a treatment note indicating a PTSD diagnosis, he sates, “PTSD is also listed but
17 signs/[symptoms] are lacking” (R. at 217). The ALJ also did not err in declining to consider
18 the effects of PTSD in his evaluation, and Plaintiff’s functional capacity and disability
19 determinations cannot properly incorporate limitations due to PTSD.

20 The sole material difference between the narrative evaluations of Plaintiff’s mental
21 health conditions by Dr. Howard and Dr. Rubin is that Dr. Rubin concludes that “signs and
22 symptoms of depression are present.” (R. at 217.) The ALJ found Dr. Rubin’s opinion that,
23 as a result, Plaintiff would be limited in following work-like procedures and making work
24 related decisions to be “inconsistent with the evidence of record” because she “scored 25
25 out of 30 on the mini mental status exam indicating intact cognition” and because other
26 records showed “normal memory and concentration, the ability to follow a three-step
27 command, full orientation and normal behavior and mood.” (R. at 48.) The ALJ also found
28 Dr. Howard’s opinion persuasive based on Dr. Howard’s actual examination of Plaintiff

1 seven months after her alleged disability onset date. (R. at 48.) Although the Commissioner
2 now requests remand for further proceedings so the ALJ can adequately resolve the
3 opinions of Dr. Rubin and Dr. Howard, the Court would find that the ALJ adequately
4 weighed the two opinions, considering the supportability and consistency factors, with
5 respect to Plaintiff's reports of depression and any resulting impact on her mental
6 functional capacity.

7 However, where the ALJ's opinion is lacking is in its consideration of Plaintiff's
8 consistently documented alcohol and cannabis abuse, or alcohol-related and cannabis-
9 related disorders, for which the records show she has refused treatment. As stated *supra*,
10 upon examination, Dr. Howard diagnosed Plaintiff with "unspecified alcohol-related
11 disorder" and "unspecified cannabis-related disorder" with "[n]o overt or clinically
12 significant signs of depression, anxiety, or any other emergent or chronic mental health
13 condition"; noted that she "is actively using both alcohol and cannabis which is likely for
14 self-medication purposes"; and gave "[n]o prognosis . . . as the diagnosis is substance
15 related." (R. at 1105–06.) For his part, Dr. Rubin also stated Plaintiff "has continued
16 alcohol abuse problems" but she "declined substance abuse [treatment]"; she "has a history
17 of alcoholic cirrhosis"; she "has been drinking on an ongoing basis, declined specific
18 [treatment] for this, and there is no discrete period of sobriety" so "her best level of
19 functioning must be considered"; and this "case is most notable for alcohol abuse." (R. at
20 216–17.)

21 In his Decision, the ALJ mentioned Plaintiff's history of alcohol abuse and related
22 alcoholic cirrhosis, but he focused his evaluation on the possible physical effects of these
23 conditions. (R. at 42.) On remand to the SSA, which both parties request, the ALJ must
24 fully consider the effects of Plaintiff's alcohol and cannabis abuse, and refusal of treatment
25 therefor, in the context of the Act and its regulations. But based on the evidence in the
26 record, the Court is left with serious doubt as to whether Plaintiff is disabled under the Act,
27 and thus remand for a calculation and payment of benefits is not warranted.

28 . . .

